

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 30, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1819-CR**

**Cir. Ct. No. 2005CF62**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY R. POPKE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Waupaca County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Anthony Popke appeals a judgment of conviction and an order denying his motion for postconviction relief. On appeal, Popke argues that the circuit court erroneously exercised its discretion in denying his

motion for resentencing. For the reasons set forth below, we affirm the judgment and order of the circuit court.

### BACKGROUND

¶2 Popke pled no contest to one count of first-degree reckless homicide, contrary to WIS. STAT. § 940.02(1) (2011-12).<sup>1</sup> After sentencing, Popke filed a motion to withdraw his plea, and the circuit court denied the motion. Popke appealed, and this court reversed the judgment of conviction in an opinion dated April 8, 2010, in appeal 2009AP1690-CR. We concluded that a letter sent to the circuit court by a police chief, in which he argued for an increased sentence for Popke rather than the recommendation the State agreed to make, was a breach of the plea agreement. We remanded the matter to the circuit court for resentencing “before a different judge, who has not seen this case before and is not privy to any of this record.”

¶3 The judge who resentenced Popke in this case had presided over a civil trial filed by the victim’s family against Popke. Counsel for the State and for Popke sent a joint letter to the court, requesting that the transcript from the original sentencing hearing be withheld from the court or, in the alternative, that references to the police chief’s letter be redacted. The circuit court held a status hearing, at which it instructed the parties to redact the sentencing transcript, and gave the parties a deadline by which to provide the court with a copy. Prior to that deadline, the clerk of court sent the court a number of items from the record that had been requested in anticipation of the resentencing. In addition to those record

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

items, the clerk sent the court three transcripts, including the transcript of the original sentencing hearing. The court provided a copy of the clerk's letter to both parties and advised the parties that it was returning the transcript of the original sentencing hearing to the clerk without reviewing it.

¶4 Popke's counsel then sent a letter to the court stating that he and the district attorney had met with the clerk of court to redact portions of the original sentencing transcript. Popke's counsel offered to have the redacted sentencing transcript sent to the court and informed the court that he and the district attorney had no objection to the court reviewing the redacted transcript of the original sentencing hearing prior to resentencing.

¶5 At the beginning of the resentencing hearing, the court told the parties that it had not read the transcript of the original sentencing hearing, stating,

I just don't see the benefit of it at this time. I'm not sure what's in the redacted portion. I'm not sure what the original sentencing was but, and I'm not sure what the Court of Appeals decided 'cause I haven't been privy to that so to speak, so to play it safe, I'm not going to read it.

The court asked if there were any objections, and both parties' counsel answered no.

¶6 The court then sentenced Popke to twenty years of initial confinement and twenty years of extended supervision. Popke's original sentence had been twenty years of initial confinement and fifteen years of extended supervision. Popke filed a postconviction motion seeking resentencing, which the court denied after a hearing. Popke now appeals.

## DISCUSSION

¶7 Popke argues three issues on appeal. We will address each one in turn, beginning with his argument that the circuit court’s failure to review the transcript of the original sentencing hearing violated his due process right to be sentenced based upon accurate information. *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Popke, however, did not object to the court’s decision not to review the transcript and he has, therefore, forfeited his right to review of the issue, except perhaps, in an ineffective-assistance-of-counsel context, which Popke has not argued on appeal. *See State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

¶8 Popke’s second argument is that he should be resentenced because the increased sentence he received at resentencing is presumptively vindictive. *See State v. Church*, 2003 WI 74, ¶53, 262 Wis. 2d 678, 665 N.W.2d 141. We disagree. The presumption of vindictiveness has been held not to apply where the resentencing authority is unaware of the original sentence. *See State v. Naydihor*, 2004 WI 43, ¶40, 270 Wis. 2d 585, 678 N.W.2d 220 (*citing Chaffin v. Stynchcombe*, 412 U.S. 17, 26 (1973)). That is the case here. The resentencing judge stated that he was not aware of what the original sentence was, which Popke does not challenge, and, therefore, no presumption of vindictiveness applies.

¶9 Finally, Popke argues, based on our instruction on remand, that resentencing be done “before a different judge, who has not seen this case before and is not privy to any of this record,” that the resentencing judge should have recused himself because he presided over the civil trial. However, the record reflects that Popke was aware that the resentencing judge had presided over the civil trial and that Popke discussed that fact with his counsel. Popke told his

counsel that he was comfortable with the resentencing judge presiding over the resentencing because the plea breach issue did not come up at the civil trial. We agree with the State's position that Popke waived his right to review of the recusal issue on appeal because he affirmatively agreed that the resentencing judge could preside over the resentencing. *See State v. Schmaling*, 198 Wis. 2d 756, 762, 543 N.W.2d 555 (Ct. App. 1995) (defense counsel's agreement to allegedly erroneous action constitutes waiver of the defendant's right to appeal alleged error).

¶10 In sum, we conclude that the circuit court properly exercised its discretion in resentencing Popke and in denying his postconviction motion.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

